Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States

SHOSHONE-BANNOCK TRIBES,
Petitioners,

v.

UNITED STATES OF AMERICA
and FMC CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the U.S. Environmental Protection Agency be required to exercise its federal fiduciary obligations to Indian tribes under the Resource Conservation and Recovery Act to fully protect and preserve reservation lands from hazardous waste pollution and contamination?

2. Should the U.S. Environmental Protection Agency's decisions be subject to a heightened scrutiny of judicial review where the federal actions directly impact trust property and tribal interests?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the petitioner Shoshone-Bannock Tribes, and the respondents United States of America and the FMC Corporation.

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Petition For A Writ Of Certiorari

The Petitioner Shoshone-Bannock Tribes respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 7, 2000.

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit is an unreported opinion of the Ninth Circuit, and is reprinted in the appendix hereto, App. 2a-6a. The order on the petition for *en banc* rehearing of the Court of Appeals is also included in the appendix, App. 1a.

The Order of the United States District Court for Idaho has not been reported. It is reprinted in the appendix hereto, App. 7a-10a.

Jurisdiction

Invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1361, 1362, and 42 U.S.C. §§ 6928(a), 6991e, the United States Environmental Protection Agency (EPA) brought this enforcement action against the FMC Corporation in the District of Idaho. Petitioner intervened into the action opposing the consent decree. On July 13, 1999, the District Court entered the lodged consent decree.

Petitioner appealed the entry of the consent decree. The Ninth Circuit entered its decision on July 7, 2000. A timely petition for *en banc* rehearing was denied by an order of the Ninth Circuit entered on October 5, 2000.

On December 19, 2000, Justice O'Connor, Circuit Justice for the Ninth Circuit, ordered that the time for filing of the instant petition be extended to and including February 2, 2001.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

Statutory And Regulatory Provisions Involved In The Case

This case involves portions of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA) and the Hazardous and Solid Waste Amendments, 42 U.S.C. §§ 6901 *et seq.*, regarding hazardous waste treatment, storage and disposal.

Statement Of The Case

In 1867, the Fort Hall Reservation (Reservation) was designated by Executive Order for the Petitioner who occupied the area for time immemorial. On July 3, 1868, the Petitioner concluded the Second Treaty of Fort Bridger, which was ratified by the United States Senate on February 24, 1869. 15 Stat. 673. Article 4 of the Fort Bridger Treaty reserved the Reservation as a "permanent home" for the Petitioner. The present day Reservation is approximately a half million acres. *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1312 (9th Cir.), *cert. denied*, 499 U.S. 943 (1991). The overwhelming majority of the Reservation (96%) is Tribal land or held by the United States for the benefit of the Tribes or its individual members. *Id.* The remaining is held in fee status. The current Reservation population is about 6,000 with the resident Tribal membership about 3,600.[1]

The Petitioner's Reservation is home to the largest elemental phosphorous plant in the world, the FMC Corporation. FMC owns approximately 1100 acres on the Reservation. *FMC v. Shoshone-Bannock Tribes, supra,* 905

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[1] The Petitioners are a federally recognized Indian tribe organized under Sections 16 and 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*, and reside in southeastern Idaho. In 1936, the Petitioner's general membership voted to adopt a Constitution and Bylaws which is one of the organic documents of the Tribes. The Tribes also have a federally chartered corporation which manages several businesses of the Tribes throughout the Reservation.

F.2d at 1312. For 50 years, FMC has generated, stored, buried, and stockpiled hazardous waste at its plant. Numerous solid waste, air emissions and wastewater streams are generated during the processing of the ore. FMC has placed reactive and ignitable waste in the ponds and surface impounds without deactivating the waste. These wastes are considered ignitable hazardous wastes pursuant to RCRA regulations. Certain ponds also store elevated airborne levels of phosphine, a highly toxic gas.

The Petitioner, river systems, streams and groundwater systems of the Reservation reside predominantly downstream and downwind from the FMC plant that emits pollutants in such large amounts that it is one of the largest polluters in the United States.[2] Last year, the Agency for Toxic Substances and Disease Control found that air emissions from the area pose a "public health hazard." Additionally, FMC's facility has contaminated the Reservation's water and land, and has caused it to be part of the Eastern Michaud Flats Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.*

In 1998, this action was commenced by the EPA against FMC for certain violations of the RCRA and regulations promulgated regarding hazardous waste treatment, storage and disposal at the FMC facility located on the Petitioner's treaty guaranteed homeland. As a result of the complaint, the EPA and FMC negotiated a consent decree to resolve the RCRA violations.

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[2] The Reservation is designated as a non-attainment area for air pollution based on the National Ambient Air Quality Standards (NAAQS) for particulate matter (PM-10) air pollution emitted from the FMC plant throughout the Reservation. FMC is the only major stationary source of PM-10 in the Fort Hall non-attainment area. EPA has never issued a federally enforceable air quality operation permit or no emission limits have been mandated by the EPA.

The Petitioner, however, was not an official party to the negotiations, the Tribal governing decisionmaking body was never consulted by EPA, and the Petitioner was not a signatory to the consent decree. A few of the Tribal staff attended some EPA meetings but no person with delegated decisionmaking authority. The Petitioner filed public comments and intervened into the federal action to oppose entry of the consent decree. The Petitioner argued that the consent decree contains provisions and agreements that are contrary to preservation of the federally guaranteed lands for the Petitioner and in disregard of the best interests of the Petitioner.

The gist of Petitioner's opposition was that EPA did not meet its trust obligations to the Tribes because it treated the Tribes as the general public and the treaty guaranteed homelands as common real estate which departed from its trust duties owed to Indian tribes when federal decisions directly impact treaty reserved lands. The EPA never specifically considered the environmental and health impacts of the consent decree (proposed federal action) on the Tribes as a separate concern and entity. The District Court granted the entry of the consent decree. App. 10a. The District Court rejected the Petitioner's claims and held that EPA had met its trust responsibility to the Tribes. The EPA adopted EPA's position that the local off-Reservation economics and public interests outweighed the trust obligations. App. 9a.

In due course, the Petitioner took an appeal to the Ninth Circuit from the final order of the District Court. The Petitioner invoked the Ninth Circuit's jurisdiction under 28 U.S.C. § 1291 to review "final decisions" of district courts.

The Petitioner claimed on appeal that the District Court erred in balancing the Tribal interests against economic interests and the general public. The Petitioner pointed out to the panel that the EPA made basic assumptions about the Tribes and Reservation environment based on general reports

for the general public, but undertook no independent investigation, review, or study of health conditions of the impacted population—the Tribes. EPA never took into account in its decisionmaking process the impacts on the Tribes as a separate entity from the surrounding community. EPA at no time attempted to glean from the Petitioner health care, diet, socioeconomic status, ecological and health risks or determine cumulative impacts on the Tribal people who have lived on Reservation all their lives and have been exposed to the hazardous waste air emissions, the dust from the slag piles, and toxic phosphine and hydrogen cyanide emissions from the waste ponds. In short, the Petitioner maintained that the trust doctrine required EPA to meet its procedural and substantive duties of protection to the Tribes, to take a hard look, and assess the impacts on the Tribal population and Reservation.

On review, the Ninth Circuit upheld the District Court decision. The panel reviewed the District Court's order based on an abuse of discretion. App. 4a. The Ninth Circuit also gave deference to the EPA and parties who negotiated the consent decree. App. 4a.

The Ninth Circuit found that the EPA "does owe a general trust responsibility to Indian tribes" but "RCRA is not aimed specifically at protecting Indian tribes." App. 4a. Thus, EPA "does not have a specific trust duty to enforce RCRA on fee lands within the Tribes' reservation." App. 4-5a. Based on this reasoning, the panel summarily concluded, "the records discloses a diligent assertion of RCRA claims by the government, a fair and extensive consultation with the Tribes, and reasonable settlement reached at arm's length between the government and FMC. The United States therefore satisfied its general trust duty to the Tribes." App. 5a.

The Petitioner timely filed a Petition for Rehearing *En Banc*. On October 5, 2000, the Ninth Circuit denied the petition for rehearing. App. 1a.

Reasons For Granting The Writ

I.

Certiorari Should Be Granted To Determine Whether EPA Has Specific Fiduciary Duties To Indian Tribes Under RCRA To Protect And Preserve Reservation Lands From Hazardous Waste Pollution And Contamination

The Ninth Circuit has fashioned for the EPA an extraordinary exception to its established fiduciary duties to Indian tribes. By upholding EPA's decision to limit its trust obligations to the Petitioner under RCRA, the Ninth Circuit permits EPA to discharge its solemn trust obligations to tribes by meeting the "general regulations and statutes not specifically aimed at protecting Indian tribes." App. 5a. This ruling for the first time raises a significant issue of the agency's trust responsibility to Indian tribes under RCRA when EPA is regulating hazardous waste generating facilities and the continued operation of such facilities located on an Indian reservation.

As it happens, EPA, on Indian reservations, is the primary permitting, monitoring, compliance and enforcement agency. Importantly, RCRA is the only major federal environmental statute that fails to expressly delegate authority to Indian tribes.[3] The Petitioner is unaware of any Indian tribe in the country that has a RCRA hazardous waste program. In this instance, where Congress has not yet expressly acknowledged Indian tribes' regulatory authority under RCRA, the federal trustee's obligations to preserve and protect Indian lands, and tribal interests is even more critical. *See Washington Dept. of*

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[3] The Clean Air Act was amended in 1977 to authorize EPA to treat tribes as states for the Act's program. 42 U.S.C. § 7474 (1994); the Safe Drinking Water Act was amended in 1986, 42 U.S.C. § 300j-11 (1994); the Comprehensive Environmental Response, Compensation, and Liability Act was amended in 1986, 42 U.S.C. §§ 9601 *et seq.*; and the Clean Water Act was amended in 1988, 33 U.S.C. §§ 1251-1387 (1994).

Ecology v. EPA, 752 F.2d 1465, 1470 (9th Cir. 1985) ("the United States in its role as primary guarantor of Indian interests legitimately may decide that such tribal concerns can best be addressed by maintaining federal control over Indian lands").

Enacted in 1976, RCRA is perhaps the most pervasive federal environmental statute that overlaps the Clean Water Act, *supra*, the Clean Air Act, *supra*, and the Comprehensive Environmental Response, Compensation, and Liability Act, *supra*. The EPA is charged with the responsibility of integrating RCRA with the other laws for the purpose of administration, permitting, and enforcement on Indian lands. However, according to the Ninth Circuit, the EPA only has to comply with general regulations and law despite the contamination occurring on Indian treaty reserved lands. This limitation of trust duties owed to tribes, particularly when EPA is the exclusive agency with authority to act, falls far short of meeting the "most exacting fiduciary standards" enunciated by this Court. *See, Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

Over 170 years ago, Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), first articulated the federal-tribal trust doctrine and recognized that the United States has a solemn trust obligation to Indian people (Indian tribes were "domestic dependent nations" whose relationship to the United States resembled "that of a ward to his guardian"). Justice Marshall's guardianship theory was grounded in a general duty of the United States, as the more powerful sovereign, to protect tribal lands and the right of self-government within tribal territories. The source of the federal government's trust responsibility is established by the provisions of treaties, agreements, statutes, and "reinforced by the undisputed existence of a general trust

relationship between the United States and Indian people." *United States v. Mitchell*, 463 U.S. 206, 226 (1983).[4]

This trust responsibility requires the federal trustee to protect Indians and their property. *See e.g., United States v. Kagama*, 118 U.S. 375, 383-84 (1886); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935). Nearly four hundred treaties between Indian tribes and the United States and an entire title of the United States Code are premised on this trust relationship. *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

All three branches of the federal government have recognized and enforced this trust responsibility. In *Seminole Nation, supra*, 316 U.S. at 296-297, this Court declared the federal trustee's obligations are even greater than those of any ordinary trustee. The Court described this relationship:

> In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under humane and self imposed policy which has found expression in many acts of Congress (footnote omitted) and numerous decisions of this Court, *it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.*

(emphasis added); *accord, United States v. Mason*, 412 U.S. 391, 398 (1973).

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[4] Over a century ago, this Court held in *Ward v. Racehorse*, 163 U.S. 504, 509 (1896), that the goals of the United States in reserving the Fort Hall Indian Reservation were "to protect . . . [the Tribes'] rights and to preserve for . . . [them] a home where . . . [their] tribal relations might be enjoyed under shelter of the authority of the United States." This trust relationship described in *Ward v. Racehorse*, was established in the Fort Bridger Treaty of 1868 wherein the Tribes agreed under Article 4 "they will make said reservation their permanent home . . . ."

The standards of fiduciary conduct imposed by the trust doctrine apply to any federal government actions including all executive agencies dealing with protected Indian interests and the administration of federal programs. *See Seminole Nation, supra; Morton v. Ruiz,* 415 U.S. 199, 236 (1974). Significantly, EPA has for many years expressly recognized a fiduciary duty toward Indian tribes. The 1984 EPA Statement on Indian policy declares, "[i]n keeping with that [trust] responsibility, the Agency will endeavor to protect the environmental interests of Indian tribes when carrying out its responsibilities that may affect the reservations. *EPA Policy for the Administration of Environmental Programs on Indian Reservations* 3 (Nov. 8, 1984). Thus, EPA's Indian Policy establishes a substantive obligation on the part of EPA to fully protect Indian property rights—trust resources.

The Ninth Circuit's decision is contrary to the trust principles announced by this Court in *United States v. Mitchell,* 463 U.S. 206 (1983).[5] In *Mitchell,* the Court determined that even apart from statutory expression of a trust, a fiduciary relationship arises whenever the executive branch maintains extensive control over Indian property. Thus, the Court's opinion creates a trust obligation arising out of circumstances rather than expressed intent. 463 U.S. at 226. In the RCRA situation on Indian reservations, the EPA has control over virtually every stage of the RCRA process—monitoring, permitting, inspections, enforcement and compliance. All of these actions directly affect and have a pervasive impact on Indian resources that, in effect, the EPA should be deemed to have control. RCRA should be, as the

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[5] In *Mitchell I and II,* the Quinault Tribe and Indian plaintiffs filed an action in the Court of Claims for seeking money damages against the United States for alleged mismanagement of forest resources on allotted lands within the Reservation. This Court affirmed the Court of Claims decision finding a breach of the United States duties on two independent trust paradigms.

Mitchell II Court pointed out, be construed in light of the federal government's fiduciary duty to Indian nations. 463 U.S. at 225. Given the presumption under the Indian trust doctrine jurisprudence that EPA is obligated to protect the best interests of tribal people and tribal lands, the court's conclusion that EPA has no special duties to tribes in the RCRA setting where hazardous waste has contaminated Indian lands—is a striking result and raises serious problems.

The distinction between (i) lands reserved by treaties, Executive Orders, or specific acts of Congress, and (ii) lands located off reservation and considered common real estate is critically important to the case at hand. Treaty reserved lands, in this instant matter, were set aside for the Tribe's benefit and federal protection pursuant to action by Congress. *See, Ward v. Racehorse, supra.* Indeed, the dominant tenet which emerges from the early treaty and trust cases is that the Indians best interests lie in preserving the tribe's sovereign nation status, resisting assimilation forces, and preserving their homelands. *See Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832). Today, most fundamentally, the modern form of the trust obligation is the federal government's duty to protect this separatism by protecting tribal lands, resources, and the Indian way of life, and shielding Indian lands from environmental threats. *See United States v. Creek Nation, supra,* 295 U.S. at 110. This federal policy of preserving tribal lands and tribal separatism is also represented in Congressional principles of tribal self-determination. *See Indian Self Determination Act,* 25 U.S.C. §§ 450 *et seq.*

The federal policy of preserving treaty reserved lands mandates a federal trustee to exercise its duties in a manner that fulfills this purpose. The Ninth Circuit's application of RCRA's "general regulations and statutes not aimed at protecting Indian tribes" to treaty reserved lands cannot be reconciled with the clear federal principles supporting the preservation of reservation lands for tribal people. The

judicially created trust principles must be applied to supplement the RCRA provisions for federal Indian lands. Otherwise, the current result will imperil the use of reservation lands and the future generations of tribal people. Review by this Court of the Ninth Circuit's ruling is thus imperative.

This case also for the first time presents the question whether the EPA may selectively exercise its responsibility to Indian tribes when pollution or contamination is initially released on fee lands located within the boundaries of an Indian Reservation. The Ninth Circuit, based on no precedent, held "the United States does not have a specific trust duty to enforce RCRA on fee land within the Tribes' reservation." App. 5a.

The Ninth Circuit's creation of an exception for fee lands located within the boundaries of a Reservation has effectively severed the trust responsibility owed to tribes when the occurrence arises on fee lands. This radical result allows EPA the unilateral authority to constrain and limit its trust obligations owed to tribes if the contamination or pollution initially arises on fee lands. The conflict between established law, the EPA's own policies, and sound, rational environmental management could not be more complete.

The Ninth Circuit's interpretation of the limits of EPA's trust relationship and responsibilities to Indian tribes is indeed a new invention, and conflicts with the protection and preservation of Indian reservations by the United States. The United States entered into treaties fixing firm reservation boundaries in order to gain perpetual "peace" or "friendship" with Indian tribes. This Court has recognized that the tribes ceded their lands through treaties in the justifiable belief that the land they retained would be held by them in perpetuity for their undisturbed possession. *United States v. Payne, supra,* 264 U.S. at 448. Accordingly, the courts have recognized the reservation land base as a protected beneficiary interest for

purposes of the trust doctrine, and the executive branch's fiduciary duty to protect the tribal land base and the tribes. *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370, 379 (1st Cir. 1975); *United States ex rel. Santa Ana Indian Pueblo v. University of New Mexico,* 731 F.2d 703, 706 (10th Cir.), *cert. denied,* 469 U.S. 853 (1984). Moreover, the duty to protect trust property has firm grounding in private trust law. *See Restatement (Second) of Trusts* § 176 (1959)("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property").

Under the decision below, however, if there is a parcel of fee land located on a reservation that is polluting the reservation land base, the EPA does not have any specific fiduciary duties to enforce environmental laws to preserve the tribe's land base. Consequently, this affords EPA unbridled ability to take enforcement actions without any obligation under the trust doctrine to take appropriate steps to protect and preserve the beneficiary interest –tribal lands.

Importantly, this decision below is contrary to this Court's ruling in *Ward v. Racehorse, supra,* that the United States has a federal duty of protection of the Petitioner's lands. In *Ward v. Racehorse,* this Court declared that the goals of the United States in setting aside the Fort Hall Reservation were to "protect . . . [the Tribes'] rights and to preserve for . . . [them] a home where . . . [their] tribal relations might be enjoyed under shelter of the authority of the United States." The trust relationship and duty could not be clearer. The Ninth Circuit's unprecedented ruling, however, makes the Tribes' land vulnerable to adverse EPA action taken both on and off reservation boundaries which may significantly diminish the usable Indian land base. Under the Ninth Circuit's ruling, the RCRA does not require the EPA to provide a degree of protection sufficient to safeguard the tribal environment. This exception conflicts with the intent of establishing the

Reservation and insuring the separatism envisioned in the treaty process. Without Congressional authorization, the EPA under the Ninth Circuit ruling is permitted to limit its trust responsibility premised on land ownership lying within treaty reserved lands.

The Ninth Circuit ruling is also irreconcilable with EPA's own definition of "Indian lands" for purposes of hazardous waste regulation on Indian reservations. The EPA has asserted that absent independent state authority to regulate within reservation borders, EPA retains jurisdiction under RCRA to regulate on "Indian lands." 51 Fed. Reg. 3782, 3783. EPA defines "Indian lands" as being synonymous with the phrase "Indian Country" that is to "mean all lands (including fee lands) within Indian reservations, dependent Indian communities, and Indian allotments to which Indians hold title. *Id.* Under the EPA's Indian Policy, the EPA has assumed its trust responsibilities to Indian tribes. The ruling below is unfounded.

II.

The Ninth Circuit's Unprecedented Creation Of A Deferential Standard Of Review In A Challenge To An Agency's Action Based On The Federal Tribal Trust Doctrine Conflicts With Decisions Of This Court And The Well Established Principles Of The Trust Doctrine.

Without any precedent, the Ninth Circuit has created a new standard of judicial review in cases challenging the executive branches fulfillment of its trust obligations to Indian tribes for actions occurring and impacting treaty reserved and protected lands. By characterizing and reviewing this case solely as an environmental consent decree matter, rather than a challenge and review of the federal agencies' trust obligations owed to an Indian tribe, the Ninth Circuit subjected the agency's

action only to a judicial scrutiny commensurate with the Administrative Procedures Act, 5 U.S.C. §§ 701-76 (1990). App. 4a. According to the Ninth Circuit, the EPA's actions affecting Indian lands is entitled to a "deference" that presumes agency action to be valid. This standard of review has never been applied in federal Indian trust doctrine cases that affect tribal property and tribal interests. Such a drastic enlargement of the presumption owed to federal agencies in the Indian law context deserves this Court's attention.

The Ninth Circuit's creation and application of "deference" in Indian trust cases conflicts with this Court's ruling in *Morton v. Ruiz*, 415 U.S. 199, 232-38 (1974). In *Ruiz*, the Court held that the principles of administrative law do not solely control a court's inquiry into the agency's decision where tribal interests are implicated. *Id.* The Court imposed trust standards on top of the standards of review required by the Administrative Procedures Act. *Id.* at 236.

Ruiz, involved a dispute over the Secretary of the Interior's denial of general assistance benefits to certain Indians because, as allegedly required by the Snyder Act, they did not live 'on or near' an Indian reservation. *Id.* at 204-205. In addition to holding that the Secretary of Interior had failed to comply with the Administrative Procedure Act and with the Bureau of Indian Affairs' own regulations, the Court stated, "the denial of benefits to these respondents under such circumstances is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Id.* at 235-37(quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).[6]

The conflict between *Ruiz* and this instant case could not be more complete. The Court will not review alleged Indian trust violations based on administrative law principles which

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[6] For further discussion of the *Ruiz* case, *see Davis, Administrative Surprises in the Ruiz Case*, 75 Mich. L. Rev. 823 (1975).

give deference to agency's decisionmaking. According to *Ruiz*, the trust responsibility requires additional scrutiny with no deference.

Second, the Ninth Circuit's ruling that EPA's actions affecting Indian lands and tribes are given deference is tantamount to it concluding that EPA has unreviewable discretion. Moreover, this concept of "deferential" review is contrary to the well established federal Tribal trust doctrine principles, presented here, that involve matters of law requiring independent judicial interpretation. Indeed, the Ninth Circuit's new standard of judicial review of agency actions renders meaningless the established heightened scrutiny of federal actions impacting trust property and tribal interests required by the trust relationship.

This Court has developed the fiduciary standard of conduct owed to Indian tribes and has repeatedly recognized that the federal executive agencies are to be "bound by every moral and equitable consideration to discharge its trust with good faith and fairness." *United States v. Payne*, 264 U.S. 446, 448 (1924). Additionally, federal officials have "moral obligations of the highest responsibility and trust for Indian property and are subject to the most exacting fiduciary standards." *Seminole Nation, supra*, 316 U.S. at 296-97. Accordingly, an Indian tribes should not be required to prove to the trustee the particular measures which are necessary because "[a] tribe is 'entitled' to rely on the United States, its guardian, for needed protection of its interests." *Creek Nation, supra*, 295 U.S. at 110. Moreover, the courts owe their own fiduciary of protection towards tribes—a duty which, can be fulfilled only through rigorous judicial review of other federal actions affecting tribal interests.

The EPA acted as legal trustee of Indian lands during the consent decree negotiations, a role which included enhanced duties beyond the normal environmental regulatory duties performed by the agency. EPA was charged under its trust

responsibility throughout the negotiations to insure that it protected the environmental interests of the Petitioner. As a fiduciary to the Petitioner, the EPA actions are "subject to the most exacting fiduciary standards." Accordingly, fiduciaries are not entitled to any sort of judicial deference when their actions are called into question. *Seminole Nation v. United States, supra,* 316 U.S. at 297.

The Ninth Circuit has fashioned a broad far reaching precedent directly at odds with the principles of the common law developed fiduciary standards which require the courts to scrutinize the actions of the federal agencies. This decision is likely to generate the application of the deferential standard to agencies other than EPA and in other contexts involving Indian tribes. Moreover, Congress has not enacted a set of statutory prescriptions to bridle or guide EPA's actions for environmental protection regarding tribal lands and resources under a federal statute, and indeed could not as a practical matter. Absent congressional guidance, the trust doctrine principles serve a vital role in providing standards to protect tribal interests against unfettered agency leeway. In this case, the panel granted undue deference to EPA's own interpretation of its trust responsibility which substantially diminishes the force of the trust doctrine as a judicial check to agency action.

The Ninth Circuit seeks justification for its standard of review by stating "deference to the consent decree is due because a district court reviewing a consent decree signed by the United States on behalf of the EPA 'must refrain from second-guessing the Executive Branch. Such deference is appropriate given [t]hat so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered our an agreement at arm's length and advocate its embodiment in a judicial decree." (citation omitted). App. 4a. But the panel's reliance on environmental discretion is misplaced.

Questions of trust obligations owed to Indian tribes by EPA are far removed from the more technical questions of EPA's expertise relating to an environmental consent decree.[7] In this instant case, the question is whether, in light of the trust responsibilities that EPA expressly assumed, it considered all reasonable alternatives and corrective actions, and negotiated a consent decree that best protected the Tribes' interests which are based upon direct information and knowledge of the Tribes' health, safety and welfare, and environment. In short, the Ninth Circuit was requested to review EPA's actions based on its trust obligations not based on the scientific, technical provisions of the RCRA statute.

Furthermore, EPA has no special agency expertise in trust responsibility and fiduciary obligations which would permit the application of a deferential standard of review as applied in the environmental context. *Cf. Udall v. Tallman*, 380 U.S. 1, 16-18, *reh'g denied*, 380 U.S. 989 (1965). This is not purely an environmental consent decree case occurring on private lands and involving the general public. This case involves trust resources and a Tribal government that has a special trust relationship with the United States and its agencies.

The Petitioner is unaware of any prior instance in which a court has reviewed and granted such deference to a federal agency. Indeed, the Court has never applied such a deferential standard to the Bureau of Indian Affairs' actions or decisions relating to implementation of federal laws and regulations impacting tribal lands and people. Certainly, the Bureau of Indian Affairs has more experience and expertise

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[7] Indeed, the trust obligations are memorialized in part by the many treaties negotiated with tribes, and the United States Constitution expressly proclaims such treaties as the "supreme law of the Land." U.S. Const. Art. VI, cl. 2. This constitutional emphasis on the rank of treaties in the federal system of laws certainly suggests a high prioritization of native interests.

than the EPA in exercising its trust responsibility to Indian tribes. The Ninth Circuit's ruling relaxes the standard of review for EPA's actions when exercising its trust responsibilities on Indian lands and impacting tribal people. Consequently, the ruling permits EPA to exercise its trust responsibility to Indian tribes in a manner different than any other federal agency. Consideration of the matter by this Court is essential to address the disparity in application of the trust doctrine among federal agencies.

Finally, the federal government's historical record of protecting tribal rights is remarkably poor. The long pattern of compromise of Indian interests, viewed in light of the vulnerable position of many tribes, gives added justification for enhanced judicial scrutiny. The Ninth Circuit's deference to EPA's determinations relating to their trust responsibility to Indian tribes might well legitimize and institutionalize a disregard for tribal rights and treaty reserved lands. In *Wilderness Soc'y v. Morton,* 479 F.2d 842, 865 (D.C. Cir.), *cert. denied,* 411 U.S. 917 (1973), Judge Skelly Wright stated:

> [I]t is our firm belief that a line must be drawn between according administrative interpretations deference and the proposition that administrative agencies are entitled to violate the law if they do it often enough. Not to draw a line is to make a mockery of the judicial function . . . . 'The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia.'

(*quoting Volkswagen Werk Aktiengesellschaft v. F.M.C.,* 390 U.S. 261, 272 (1968)).

The Ninth Circuit has manufactured a new unprecedented standard of review of deference for a federal agency in the Indian law trust context. The Ninth Circuit has failed to appreciate the significant impact this decision will have in the area of federal Indian law. There is a compelling need for this Court's review.

Conclusion

For the foregoing reasons Petitioner respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

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